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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

LAUREN CALVERT  
Plaintiff,

vs.

CASE NO: 2:13-cv-00464-MMD-NJK

DARLENE ELLIS AS SUCCESSOR IN  
INTEREST TO MICHAEL WAYNE  
ELLIS, EXPRESS DAILY, DAILY  
EXPRESS, INC., DOE OWNER, I-V,  
DOE DRIVER, I-V, ROE EMPLOYER,  
ROE COMPANIES and ROE TRUCKING  
COMPANY

Defendants.

**MOTION TO STRIKE IMPROPER REBUTTAL EXPERTS**

**MEMORANDUM OF POINTS AND AUTHORITIES**

COME NOW, Plaintiff, by and through her attorneys, MORRIS ANDERSON, and  
hereby moves this Honorable Court for the relief requested herein.

1 This Motion is based on the Points and Authorities set forth below, the papers and  
2 pleadings on file herein, and such oral argument as may be heard at the time of the hearing  
3 of this matter.  
4

5 **NOTICE OF MOTION**

6 To: ALL PARTIES AND THEIR COUNSEL OF RECORD

7 YOU WILL PLEASE TAKE NOTICE that the foregoing Motion will come on for  
8 hearing before the above entitled Court on the \_\_\_\_ day of \_\_\_\_\_, 2014, at  
9 \_\_\_\_\_ .m., or as soon thereafter as counsel can be heard.  
10

11 DATED this 29th day of April, 2014.

12 MORRIS ANDERSON LAW

13 By: /s/ Ryan M. Anderson  
14 RYAN M. ANDERSON, ESQ.  
15 716 S. Jones Blvd.  
16 Las Vegas, Nevada 89107  
17 Attorneys for Plaintiff

18 **I.**

19 **STATEMENT OF FACTS**

20 This case arises out of a motor vehicle collision that occurred on May 6, 2011. Plaintiff  
21 Lauren Calvert was turning left on a green light when Defendant Michael Ellis, driving in the  
22 course and scope of his employment with Defendants Express Daily and Daily Express, Inc.,  
23 ran a red light in the intersection and struck Ms. Calvert. Defendants caused significant injury  
24 to Ms. Calvert that has and will require multiple surgeries. Defendants admitted liability for  
25 causing the collision, thus the only issues in this case are Ms. Calvert's injuries and damages.  
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1 On April 9, 2013, Defendants disclosed their initial expert witness, Derek Duke, M.D., a  
2 neurosurgeon. (*See* Defendants' Rule 26 Production, Apr. 9, 2013, without exhibits, attached  
3 hereto as **Exhibit "A"**). On January 10, 2014, Plaintiff disclosed his retained initial expert  
4 witnesses: (1) Michael Prater, M.D., pain management physician; (2) Mark Kabins, M.D.,  
5 orthopedic surgeon; (3) Stuart Kaplan, M.D., neurosurgeon; and (4) Philip Sidlow, vocational  
6 expert. (*See* Plaintiff's FRCP 26(a) Disclosures, Jan. 10, 2014, without exhibits, attached hereto  
7 as **Exhibit "B"**).  
8

9 The initial expert deadline in this case was on January 14, 2014. On January 7, 2014,  
10 Defendants filed an Emergency Motion to Extend Discovery, asking this Court to extend  
11 discovery and the initial expert deadline, which Plaintiff opposed. (*See* Dkt. 39). On January  
12 14, 2014, this Court denied Defendants' Motion, stating that Defendants did not show good  
13 cause to extend the expert deadline or discovery, and further that the evidence indicated that  
14 Defendants had not been diligent about discovery regarding Plaintiff's physicians and medical  
15 records. (*See* Dkt. 44, at p. 4:16-24). This Court found that extending discovery would greatly  
16 prejudice Plaintiff. (*See* Dkt. 44, at p. 5:15-17).  
17

18 Defendants did not disclose any additional initial experts on or before the deadline on  
19 January 14, 2014, aside from their earlier disclosure of Dr. Duke.  
20

21 Nearly one month later on February 12, 2014, however, Defendants disclosed the  
22 following experts, labeling them as "rebuttal" experts: (1) Edward Howden, vocational expert;  
23 (2) Clark Smith, M.D., psychiatrist; (3) John Schneider, Ph.D., economist; and (4) Kevin  
24 Kirkendall, CPA. (*See* Defendants' FRCP 26(a) List of Witnesses and Documents, Fourth  
25 Supp., Apr. 9, 2013, without exhibits, attached hereto as **Exhibit "C"**).  
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Although these experts are designated as “rebuttal” experts, they are not proper rebuttal experts because the issues on which they offer opinions are central to the case. Further, they do not address or rebut Plaintiff’s initial expert opinions. The failure to designate these experts as initial experts blatantly circumvents this Court’s Order denying Defendants’ request to extend the initial expert deadline, and is neither harmless nor substantially justified. Therefore, Plaintiff respectfully requests this Court to strike Mr. Howden, Dr. Smith, Dr. Schneider, and Mr. Kirkendall as experts in this case.

## II.

### ARGUMENT

#### **A. The Opinions of Dr. Smith, Dr. Schneider, Mr. Howden, and Mr. Kirkendall are Not Proper Rebuttal Opinions as They Do Not Rebut Plaintiff’s Experts or Address Anticipated Portions of Plaintiff’s Case-in-Chief**

Expert disclosures shall be made “at the times and in the sequence that the court orders.” Fed. R. Civ. P. 26(a)(2)(D). FRCP 26(a)(2)(D)(ii) permits the admission of rebuttal expert testimony that is “intended solely to contradict or rebut evidence on the same subject matter identified *by an initial expert witness*.” *R&O Constr. Co. v. Rox Pro Int’l Group, Ltd.*, 2011 WL 2923703, \*2 (D. Nev. July 18, 2011) (emphasis added). Merely addressing the same general subject matter is not sufficient to show an expert is a rebuttal expert rather than an initial expert; the expert must directly address the adverse expert’s findings. *See id.* at \*3.

Rebuttal expert reports are proper if they contradict or rebut the subject matter of the initial expert’s report, but they are not the proper place for presenting new arguments. *Nunez v. Harper*, 2014 WL 979933, \*1 (D. Nev. Mar. 11, 2014) (citing *R&O Constr. Co.*, 2011 WL 2923703 at \*2). Rebuttal expert opinions should address new, unforeseen issues upon which the opposing party’s initial experts have opined. *Id.* “If the purpose of expert testimony is to

1 contradict an expected and anticipated portion of the other party's case-in-chief, then the  
2 witness is not a rebuttal witness or anything analogous to one." *Id.* Presenting a new,  
3 alternative theory of causation is not a rebuttal opinion; rather, it is an expected and anticipated  
4 portion of a party's case-in-chief. *See Amos v. Makita U.S.A., Inc.*, 2011 WL 43092, \*2 (D.  
5 Nev. Jan. 6, 2011).

7 A party cannot abuse the rebuttal date and use it as "an extension of the deadline by  
8 which a party must deliver the lion's share of its expert information." *Amos*, 2011 WL 43092 at  
9 \*2 (citing *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 571 (5th  
10 Cir. 1996).

12 In *Nunez*, this Court addressed the exact issue presented in the instant Motion. There,  
13 the plaintiff moved to strike defense expert Dr. Duke because in his rebuttal report, he provided  
14 an alternative theory to causation, concluding that psychological factors caused the plaintiff's  
15 pain complaints rather than the subject incident. *Nunez*, 2014 WL 979933 at \*2. The  
16 defendants opposed the motion, arguing that Dr. Duke covered the same subject matter as the  
17 plaintiff's expert report: the plaintiff's medical condition, whether her condition was related to  
18 the subject incident, and whether she needed future treatment. *Id.* The defendants further  
19 argued that Dr. Duke rebutted the plaintiff's expert by addressing information that the plaintiff's  
20 expert did not address, and also directly rebutted the expert's findings, noting there was no  
21 evidence to support the conclusions and they were incomplete because the plaintiff's expert did  
22 not have a complete medical history. *Id.*

25 This Court held in *Nunez* that Dr. Duke's opinions were improper rebuttal opinions  
26 because they were not restricted to attacking the plaintiff's experts, and his alternate theory of  
27 causation was an entirely new argument. *Id.* at \*3. Dr. Duke set forth a number of his own  
28

1 theories in his report, including lists of unrelated and related diagnoses, and only minor portions  
 2 directly contradicted the plaintiff's expert. *Id.* Therefore, Dr. Duke's report did not constitute  
 3 rebuttal opinions; rather, they were untimely disclosed initial expert opinions. *Id.* at \*4.

4  
 5 Here, Defendants disclosed Edward Howden; Clark Smith, M.D.; John Schneider,  
 6 Ph.D.; and Kevin Kirkendall, CPA as "rebuttal" experts, however, this label does not disguise  
 7 the fact that they are initial experts who were untimely disclosed because this Court did not  
 8 grant Defendants' request to extend the initial expert deadline. As the following subsections  
 9 detail, these experts provide opinions that are central to the case and should have been  
 10 anticipated by Defendants, and they do not address or rebut Plaintiff's initial expert opinions.

11  
 12 *1. Plaintiff Does Not Have Any Psychiatric/Psychological Expert Thus Dr. Clark, a*  
 13 *Psychiatrist, Does Not Rebut Any of Plaintiff's Experts and Provides Entirely*  
 14 *New Opinions*

15 This argument sets aside and reserves Plaintiff's right to later address the clear  
 16 violations of FRE 702 and *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.  
 17 Ct. 2786 (1993) that Dr. Clark presents as a psychiatrist responding to opinions in the fields of  
 18 orthopedic surgery, pain management, neurosurgery, and vocational rehabilitation.

19 It appears that Dr. Clark, a psychiatrist, attempts to rebut the opinions of *all* of Plaintiff's  
 20 experts: Dr. Kabins, an orthopedic surgeon; Dr. Prater, a pain management physician; Dr.  
 21 Kaplan, a neurosurgeon; and Mr. Sidlow, a vocational expert. (See Clark Report, attached as  
 22 **Exhibit "D,"** at pp. 5-8; Kabins Report, attached as **Exhibit "E,"** Prater Report, attached as  
 23 **Exhibit "F,"** Kaplan Report, attached as **Exhibit "G,"** Sidlow Reports, attached as **Exhibit**  
 24 **"H").** Dr. Clark is an improper rebuttal expert disclosure on its face given that Plaintiff has no  
 25 psychological or psychiatric expert whatsoever. Furthermore, Dr. Clark presents an entirely  
 26 new theory of causation for Ms. Calvert's injuries: her psychological condition. (*Id.*).  
 27  
 28

1 Presenting a new, alternative theory of causation is not a rebuttal opinion; it is an expected and  
2 anticipated portion of a party's case-in-chief. *See Amos*, 2011 WL 43092 at \*2.

3 Dr. Clark in this case can be analogized to Dr. Duke in *Nunez* because in both cases, the  
4 experts say the plaintiff's experts' opinions are incomplete because experts did not have a  
5 complete medical history, for example:  
6

7 . . . The evaluating doctors were not told about these injuries and no medical records  
8 regarding any evaluation of her back or neck was documented prior to the motor vehicle  
9 accident.

10 (See **Exhibit "D,"** at p. 6; *Nunez*, 2014 WL 979933 at \*2-3).

11 . . . Because she was not honest with her physicians about her severe alcoholism and  
12 recent fall down the stairs, this possibility was not considered.

13 (*Id.*).

14 Phillip Sidlow, M.D., C.R.C. was aware of the 5 DUI arrests, the chronic sedative  
15 hypnotic sleeping pill dependency, . . . yet he did not discuss any of these factors in his  
16 estimation of future work and/or life expectancy. . .

17 (*Id. at p. 7*).

18 Furthermore, in both *Nunez* and the instant case, the experts proffer an alternative theory  
19 to causation, concluding that psychological factors caused the plaintiff's pain complaints rather  
20 than the subject incident. *Nunez*, 2014 WL 979933 at \*2-3. Here, Dr. Clark states that Ms.  
21 Calvert's alleged alcohol dependency, cigarette smoking, sedative hypnotic sleeping pill  
22 dependency, and bipolar disorder would decrease her life expectancy to 49 years. (See **Exhibit**  
23 **"D"** at pp. 7-8). None of Plaintiff's experts address these issues, and they are not new,  
24 unforeseen issues that were unknown to Defendants prior to the initial expert deadline. Only  
25 two paragraphs in the entire report address medical records in January 2014, and the rest are  
26 from 2013 or earlier. Dr. Clark's opinions regarding Ms. Calvert's alleged dependencies and  
27 psychological condition as the cause, or contributing factors, to her injuries and life expectancy  
28

are brand new opinions. Just as Dr. Duke was found to provide initial expert opinions in *Nunez*, here, Dr. Clark should be found to be an initial expert rather than a rebuttal expert.

2. *Dr. Schneider Presents Entirely New Opinions That Do Not Rebut Any of Plaintiff's Experts*

The face of Dr. Schneider's report makes blatantly clear that his opinions are not rebuttal opinions because the topic alone, "Health Economics," is not addressed in any of Plaintiff's expert reports. (See Schneider Report, attached hereto as **Exhibit "I"**). Dr. Schneider states that his report serves as a rebuttal to the valuation opinions of Dr. Kaplan, Dr. Prater, and Dr. Kabins, however, he fails to address or respond to any of their opinions. (*Id.* at p. 1). First of all, this single sentence is the *sole mention* of these doctors in Dr. Schneider's entire report. Second, Dr. Schneider fails to address a single opinion of Dr. Kaplan, Dr. Prater, or Dr. Kabins. Third, Dr. Kaplan, Dr. Prater, and Dr. Kabins do not provide any "valuation opinions" in their reports, thus it is unknown what Dr. Schneider "rebutts" in his report. (See **Exhibits "E," "F," and "G"**).

Dr. Schneider's report provides entirely new opinions, methods, and issues that are not in Plaintiff's expert reports and Plaintiff did not even know were an issue in this case. It is abundantly clear that he was intended to be an initial expert, but Defendants missed the deadline. Therefore, this Court should find that Dr. Schneider is clearly an initial expert and not rebuttal in nature at all.

3. *Mr. Howden Minimally Addresses the Findings of Plaintiff's Vocational and Economic Expert, Mr. Sidlow, and Utilizes an Entirely New Expert Method*

Mr. Howden only cursorily addresses the opinions of Mr. Sidlow, Plaintiff's vocational and economic expert. (See Howden Report, attached hereto as **Exhibit "J,"** at p. 2). Mr. Howden's report presents initial expert opinions using an entirely new method of analysis, the



1 RAPEL method. (*Id.* at pp. 5-6). His report does not merely respond to Mr. Sidlow's opinions,  
 2 but reviews and analyzes all of the evidence in this case. (*Id.* at pp. 3-7). Although he includes  
 3 a handful of sentences scattered throughout his report that addresses the specific finds of Mr.  
 4 Sidlow, the vast majority of it consists of brand new vocational opinions, utilizing a brand new  
 5 method of analysis. Merely addressing the same general subject matter of Plaintiff's expert is  
 6 not sufficient to show that Mr. Howden is a rebuttal expert rather than an initial expert; Mr.  
 7 Howden must directly address Mr. Sidlow's findings in order to be a proper rebuttal expert. *See*  
 8 *R&O Constr. Co.*, 2011 WL 2923703 at \*3. Furthermore, rebuttal opinions are not those that  
 9 address an expected and anticipated part of Plaintiff's case-in chief. *Nunez*, 2014 WL 979933 at  
 10 \*1. Defendant has vaguely shrouded Mr. Howden's initial expert opinions as rebuttal opinions,  
 11 but Mr. Howden barely addresses Mr. Sidlow's findings, and Ms. Calvert's loss of earning  
 12 capacity has been a central part of this case from the beginning of litigation. Therefore, Plaintiff  
 13 respectfully requests this Court to find that Mr. Sidlow was improperly disclosed as a rebuttal  
 14 expert.  
 15

16  
 17  
 18 4. *Although Mr. Kirkendall Addresses Some of Mr. Sidlow's Opinions, He Utilizes*  
 19 *an Entirely New Expert Method and Presents New Opinions*

20 This argument sets aside and reserves Plaintiff's right to later address the clear  
 21 violations of FRE 702 and *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.  
 22 Ct. 2786 (1993) that Mr. Kirkendall presents as a CPA giving vocational expert opinions, and  
 23 also the cumulative and duplicative nature of his and Mr. Howden's opinions.  
 24

25 Mr. Kirkendall does address the opinions of Mr. Sidlow, Plaintiff's vocational and  
 26 economic expert. (*See* Kirkendall Report, attached hereto as **Exhibit "K"**). Like Mr. Howden,  
 27 however, he presents an entirely new method of analysis, the RAPEL method. (*Id.* at pp. 5-6).  
 28 Most importantly, Defendants knew from the beginning of litigation that Plaintiff was claiming

1 lost wages and lost earning capacity. An opinion is not rebuttal in nature if it presents opinions  
2 that are expected and anticipated in Plaintiff's case-in-chief, and it does not address new,  
3 unforeseen issues presented by Plaintiff's initial experts. *See Nunez*, 2014 WL 979933 at \*1;  
4 *R&O Constr. Co.*, 2011 WL 2923703 at \*2. Because Defendants knew that Plaintiff was  
5 claiming lost wages and lost earning capacity, Mr. Kirkendall presents an entirely new method  
6 to analyze vocational loss, and he does not address any new issues from Plaintiff's experts,  
7 Plaintiff respectfully requests this Court to find that Mr. Kirkendall is an initial expert.  
8

9 The foregoing facts, law, and analysis demonstrate that Dr. Clark, Dr. Schneider, Mr.  
10 Howden, and Mr. Kirkendall are initial experts thinly veiled as "rebuttal" experts because  
11 Defendants missed the initial expert deadline. The following section shows the Court that  
12 Defendants' untimely disclosure of these initial expert opinions are neither harmless nor  
13 substantially justified, and these experts should be stricken.  
14

15 **B. Defendants' Late Disclosure of Initial Expert Opinions Should Be Stricken as They**  
16 **Circumvent This Court's Previous Order Denying an Extension of the Initial**  
17 **Expert Deadline Because Such an Extension Would Prejudice Plaintiff**

18 Pursuant to FRCP 37(a), if a party fails to comply with FRCP 26(a), it may not use that  
19 evidence at trial, a hearing, or in a motion unless such failure was substantially justified or  
20 harmless to the opposing party. *R&O Constr. Co.*, 2011 WL 2923703 at \*3. The burden is on  
21 the disclosing party to show that the delay was substantially justified or harmless. *Amos*, 2011  
22 WL 43092 at \*3 (citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106-07  
23 (9th Cir. 2001)). Factors to consider in deciding whether a violation of a discovery deadline is  
24 justified or harmless are: (1) prejudice or surprise to the opposing party; (2) the ability of that  
25 party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or  
26 willfulness involved in the untimely disclosure. *Id.*  
27  
28

1 In *Nunez*, this Court found that although Dr. Duke was an untimely-disclosed initial  
2 expert, there was no harm to the plaintiff because the discovery deadline had been extended.  
3 *Nunez*, 2014 WL 979933 at \*5. Instead, this Court sanctioned the defendant by restricting Dr.  
4 Duke's testimony so that he could not rebut any of the plaintiff's experts; telling the jury that  
5 Dr. Duke had the tactical advantage of seeing the plaintiff's expert reports before preparing his  
6 opinions; allowing the plaintiff to take Dr. Duke's deposition and supplement her expert reports;  
7 and prohibiting the defendant from taking depositions of the plaintiff's experts. *Id.*

9 The instant case differs from nearly all of those addressed in the District of Nevada,  
10 including *Nunez*, because none of these previous cases involved a defendant's blatant disregard  
11 of a court order denying defendant's request for an extension of the initial expert deadline.  
12 Here, the Court expressly denied Defendants' request to extend the initial expert deadline. (*See*  
13 Dkt. 44). The Court found that there was no good cause to extend the deadline and Defendants  
14 had not exercised diligence in obtaining certain medical discovery that Defendants stated was  
15 allegedly necessary to their expert reports. (*Id.* at p. 4). Most importantly to the instant Motion,  
16 this Court found that the discovery deadlines had already been extended before, and further  
17 extending discovery "***will greatly prejudice the opposing party,***" Plaintiff. (*Id.* at p. 5). This  
18 Court also noted that Defendants' request for the extension showed they "hoped to substantially  
19 delay the case." (*Id.*).

22 Defendants blatantly ignored this Order, circumventing it by cloaking its initial experts  
23 as rebuttal experts. The findings by this Court in the Order show that Defendants' untimely  
24 initial expert opinions are neither harmless or substantially justified pursuant to the four factors  
25 to be analyzed:  
26  
27  
28

1 (1) **Prejudice or surprise to the opposing party:** this Court already found that extending  
 2 the initial expert deadline would prejudice Plaintiff because it would cause discovery to  
 3 be extended and trial to be delayed (Dkt. 44, at p. 5);

4  
 5 (2) **The ability of that party to cure the prejudice:** Defendants' experts, particularly Dr.  
 6 Clark and Dr. Schneider, present entirely new opinions and defense theories in  
 7 psychiatry and "health economics." Plaintiff does not have any expert in these fields  
 8 thus it is impossible for Plaintiff to cure the prejudice caused by Defendants' disclosure  
 9 of their "rebuttal" experts;  
 10

11 (3) **The likelihood of disruption of the trial:** as stated before, this Court already found  
 12 that extending the initial expert deadline would cause discovery to be extended and trial  
 13 to be delayed (Dkt. 44, at p. 5); and

14 (4) **Bad faith or willfulness involved in the untimely disclosure:** Defendants already  
 15 asked this Court to extend the initial expert deadline and the request was denied, thus  
 16 they are fully aware that their "rebuttal" experts are actually initial expert opinions.  
 17 Defendants willfully disclosed these opinions, masquerading them as rebuttal opinions  
 18 and hoping they could skirt by Plaintiff and the Court without detection. This blatant  
 19 violation of the Court's Order constitutes bad faith, or at least full knowledge that their  
 20 experts' opinions are not truly rebuttal in nature.  
 21  
 22

23 *See Amos*, 2011 WL 43092 at \*3 (citing *Yeti by Molly, Ltd.*, 259 F.3d at 1106-07).

24 All four factors are present in this case that support a showing of harm caused by  
 25 Defendants' untimely disclosures. Defendants know full well that their experts do not provide  
 26 rebuttal opinions and they in fact improperly provide the "lions share of its expert information"  
 27 that is appropriate only for initial experts. *See Amos*, 2011 WL 43092 at \*2 (citing *Sierra Club*,  
 28

1 *Lone Star Chapter*, 73 F.3d at 571). Defendants’ “rebuttal” expert opinions are merely an  
2 attempt to circumvent this Court’s Order denying their request to extend the initial expert  
3 deadline, however, a party cannot abuse the rebuttal date and use it as an extension of the initial  
4 expert deadline. *See id.* Because these opinions are not rebuttal in nature and their untimely  
5 disclosure is neither harmless, nor substantially justified, Plaintiff respectfully requests this  
6 Court to strike Dr. Clark, Dr. Schneider, Mr. Howden, and Mr. Kirkendall as experts.  
7

8 **III.**

9 **CONCLUSION**

10  
11 Based on the foregoing facts, law, and analysis, Plaintiff respectfully requests this Court  
12 to GRANT her Motion to Strike Improper Experts.

13  
14 DATED this 29th day of April, 2014.

15 MORRIS ANDERSON LAW

16  
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